Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	CG Docket No. 02-278
Rules and Regulations Implementing the	)	
Telephone Consumer Protection Act of 1991	)	

To: The Commission

COMMENTS OF
The Electronic Privacy Information Center; J. C. Pierce, Director, the Consumer Task Force for Automotive Issues; Remar Sutton; Consumer Action; Privacy Rights Clearinghouse; Consumer Federation of America; International Union, UAW; Free Congress Foundation; Junkbusters Corp.; Consumer Project on Technology; Computer Professionals for Social Responsibility; and Private Citizen Inc.

December 9, 2002

Pursuant to the notice[1] released by the Federal Communications Commission (FCC) on September 18, 2002 regarding the notice of proposed rulemaking (NPRM) on the Telephone Consumer Protection Act (TCPA), the Electronic Privacy Information Center; J. C. Pierce, Director, the Consumer Task Force for Automotive Issues; Remar Sutton; Consumer Action; Privacy Rights Clearinghouse; Consumer Federation of America; International Union, UAW; Free Congress Foundation; Junkbusters Corp.; Consumer Project on Technology; Computer Professionals for Social Responsibility; and Private Citizen Inc. submit the following comments.

We commend the FCC for opening this rulemaking on the TCPA. Since that law was passed in 1991, privacy has become a chief political issue for Americans.[2] In a 1999 NBC News poll, respondents indicated that threats to personal privacy would be the greatest challenge facing individuals in the next century.[3] To address this challenge, Americans have indicated support for a legislative framework of protections.[4]

In the case of telemarketing,[5] public opinion is clear: telemarketing is regularly identified as an obnoxious and unwanted intrusion into the privacy of the home.[6] Individuals are at a

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[1] Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, FCC #02-250, CG Docket No. 02-278, CC Docket No. 92-90, at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-02-250A1.txt.
[2] EPIC maintains an archive of privacy polls online at http://www.epic.org/privacy/survey/.
[3] Wall Street Journal/NBC News Poll, Fall 1999, *reported in*, *Report Slams Privacy Policies; Poll Finds Privacy is Top Concern*, 6 EPIC Alert 15, Sept. 23, 1999, at http://www.epic.org/alert/EPIC_Alert_6.15.html.
[4] A March 2000 BusinessWeek/Harris Poll found that 57% of respondents favored laws that would regulate how personal information is used. In that same poll, only 15% supported self-regulation. *BusinessWeek/Harris Poll: A Growing Threat*, BusinessWeek Magazine, March 2000, at http://www.businessweek.com/2000/00_12/b3673010.htm.
[5] We adopt the FCC's definition of "telemarketer." *See supra* note 1, at n.4.

disadvantage in preventing telemarketing because of the technology, practices, and flow of personal information employed by the telemarketing industry.[7] Telemarketing leads individuals to purchase antitelemarketing devices, services such as caller ID, and to regularly screen all calls with an answering machine.

Even those who regularly opt out under the current system cannot eliminate telemarketing calls. In fact, organizations such as Privacy Rights Clearinghouse have advised individuals that eliminating telemarketing calls is difficult; even diligent individuals can obtain only a reduction in calls.[8] Individuals want more control over their personal information, and commercial use of their communications devices.

Individuals' frustration in regaining control over their communications devices also has been reflected in a number of recent institutional newspaper editorials. The Atlanta Journal-Constitution editorialized recently in favor of a national do-not-call (DNC) list, a ban on predictive dialers, a ban on telemarketers sharing personal information, and stiff monetary fines for violators.[9] USA Today recently wrote in support of a national DNC list as well.[10]

Telemarketing is one of the negative consequences of a lack of information privacy law in America. Without limitations on the collection and use of personal information, telemarketing and list brokerage companies can mine databases and share personal information, often without even providing notice to the individual affected. Data miners strip personal information from product warranty cards, public records, sweepstakes entry forms, and many other sources. This results in the creation of detailed consumer databases that include health information, religious affiliation, book reading preferences, financial information, and product ownership. Information brokers, such as Experian, American List Counsel, and many Direct Marketing Association (DMA) members, then sell these detailed lists for direct mail and telemarketing.[11]

I. General Comments

A. An opt-in approach to telemarketing would more effectively protect individuals' rights and ensure that only those who wish to be called receive solicitations.

Individuals' rights and privacy would be more effectively protected by an opt-in framework rather than the opt-out do-not-call (DNC) list considered by the FCC. An opt-in approach would require telemarketers to obtain express consent before initiating sales calls to individuals.

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[6] A 2000 USA Weekend poll found that 75% of respondents consider phone calls at home from telemarketers to be an invasion of privacy. Jedediah Purdy, *An Intimate Invasion*, USA Weekend, Jun. 30, 2000, at http://www.usaweekend.com/00_issues/000702/000702privacy.html.

[7] EPIC maintains a comprehensive web page on telemarketing practices at http://www.epic.org/privacy/telemarketing/.

[8] *Fact Sheet 5: Telemarketing Calls*, Privacy Rights Clearinghouse, Jan. 2002, at http://www.privacyrights.org/fs/fs5-tmkt.htm.

[9] *Our Opinions: Long-overdue measures to silence telemarketers*, Atlanta Journal-Constitution, Sept. 26, 2002, at http://www.accessatlanta.com/ajc/epaper/editions/thursday/opinion_d3299a5c53b2d0cd00a8.html.

[10] *Consumers deserve stronger shield against telemarketers*, USA Today, Sept. 17, 2002.

[11] EPIC maintains a comprehensive web page on consumer profiling at http://www.epic.org/privacy/profiling/.

An opt-in framework would better protect individuals' rights, and is consistent with most United States privacy laws. For instance, the Family Educational Rights and Privacy Act, Cable Communications Policy Act, Electronic Communications Privacy Act, Video Privacy Protection Act, Driver's Privacy Protection Act, and Children's Online Privacy Protection Act all empower the individual by specifying that affirmative consent is needed before information is employed for secondary purposes.[12]

Further, public opinion clearly supports an opt-in system for information collection and sharing. A study conducted by the American Society of Newspaper Editors (ASNE) and the First Amendment Center (FAC) in April 2001 illustrated strong support for privacy and specifically for opt-in systems.[13] In that study, the respondents indicated that personal privacy was an issue as important as crime, access to health care, and the future of the Social Security system.

In other information collection contexts, individuals regularly indicate that opt-in is preferable to opt-out. The ASNE/FAC study shows that 76% of individuals support opt-in as a standard for sharing of driver's license information. A study conducted by Forrester Research found that 90% of Internet users want the right to control how their personal information is used after it is collected.[14] A study conducted by the Pew Internet and American Life Project found that 86% of Internet users favor opt-in privacy policies.[15] And, a BusinessWeek/Harris poll in 2000 found that 86% favored opt-in over opt-out. The same poll showed that if given a choice, 90% of Internet users would either always or sometimes opt out of information collection.[16]

It is important to note that the public statements of telemarketing industry groups support an opt-in framework for information sharing. For instance, the American Teleservices Association has argued that telemarketers should not call individuals who are uninterested:

> "… The primary expenses of the business are determined by the time spent on the telephone. A company is often measured by the amount of dollars generated per telephone or per chair. The single greatest predictor of failure in the industry is low per chair production. And the single greatest contributor to low per chair production is spending time on the telephone with people who don't want to talk to you. Thus the industry goes to great lengths to identify only those consumers who are likely purchasers of their products. The successful telemarketer is the business that talks to the fewest uninterested parties. Consequently, it is in the industry's best interests to keep a detailed "Do-Not-Call" list. Not only does it make sense for a company's bottom line, but it increases morale and production

[12] Respectively, at 20 U.S.C. § 1232 g, 47 U.S.C. § 551, 18 U.S.C. § 2510 et. seq., 18 U.S.C. § 2710, 18 U.S.C. § 2721, and 15 U.S.C. § 6501.
[13] Anders Gyllenhaal & Ken Paulson, *Freedom of Information in the Digital Age*, Apr. 2001, at http://www.freedomforum.org/.
[14] *The Privacy Best Practice*, Forrester Research, Sept. 1999.
[15] Susannah Fox, *Trust and Privacy Online: Why Americans Want to Rewrite the Rules*, the Pew Internet & American Life Project, Aug. 20, 2000.
[16] *Business Week/Harris Poll: A Growing Threat*, BusinessWeek, Mar. 20, 2000, at http://www.businessweek.com:/2000/00_12/b3673010.htm.

> among the sales force if they are not talking to hundreds of people who say "No" at the beginning of the call."[17]

The ATA's argument could be applied cogently in support of an opt-in system. Through an opt-in system, telemarketers will only contact those interested in receiving sales calls. Telemarketers will not be burdened by calling those who do not wish to receive calls, and individuals will not be burdened by having to opt-out from every telemarketer who calls on a given day.

Economically, opt-in systems may be more lucrative for telemarketers as well. Mike DeCastro of Imagination claims that acquiring a customer through opt-out lists cost six times more than using opt-in lists.[18]

Opt-out systems shift costs onto the recipients of telemarketing. Individuals attempt to avoid calls by purchasing anti-telemarketing technology and anti-telemarketing services. However, these expenditures can reduce but not eliminate telemarketing. Accordingly, the telemarketing industry will continue to call persons who do not want to receive calls under an opt-out system.

Opt-out can only be effective when individuals have adequate notice of sales calls practices and the flow of their personal information. However, the public does not have access to information on how the telemarketing industry works, especially in regard to the use of predictive dialers and the avoidance of sending caller identification information. Additionally, individuals do not have notice of the flows of personal information traded by list brokers. Individuals may unwittingly enroll themselves on dozens of lists based on their participation in sweepstakes, a listing in the phone book, or in registering a product through a warranty card.

Opt-in is more effective than opt-out because it encourages companies to explain the benefits of information sharing, and to eliminate barriers to exercising choice. Experience with opt-out has shown that companies tend to obfuscate the process of exercising choice, or that exemptions are created to make opt-out impossible. For instance, the Gramm-Leach-Bliley Act required opt-out notices to be sent to customers of banks, brokerage houses, and insurance companies.[19] These notices were confusing and in fact incomprehensible to many Americans.[20] Opting out often required the consumer to send a separate letter to the company. Even if a consumer did opt out under the law, a company that wished to share consumer data could simply create a joint marketing agreement with another company to fall within an exemption to the prohibition on information sharing.[21]

In other contexts, phone companies have thwarted opt-out processes by demanding excessive authentication for opting out. For instance, the opt-out process for Customer Proprietary

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[17] ATA Comments to the FTC on the Telemarketing Sales Rule, at http://www.ataconnect.org/htdocs/govtrel/comments/tsr_ftc_comments_may00.PDF.
[18] Michael L. Pinkerton, *Opt-In vs. Opt-out: No Real Contest*, CAL Advisor, Sept. 9, 2001.
[19] 15 U.S.C. § 6801.
[20] Mark Hochhauser, *Lost in the Fine Print: Readability of Financial Privacy Notices*, July 2001, at http://www.privacyrights.org/ar/GLB-Reading.htm.
[21] 15 U.S.C. § 6802 (b)(2).

Network Information (CPNI) data sharing established by Verizon was confusing, and placed the burden on individuals to navigate a five-step process in order to opt-out.[22]

B. The Commission's proposed regulations are consistent with First Amendment principles.

All of the Commission's proposed regulations on telemarketing are consistent with the United States commercial speech doctrine, as defined by *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*,[23] and therefore do not run afoul of the First Amendment.[24]

No Constitutional protection should be granted to the broad range of telemarketing that is fraudulent. Authorities price telemarketing fraud at $40 billion a year, meaning that a significant percentage of sales calls are for fraudulent purposes. Any such conduct is not protected speech, and is therefore rightly prohibited. However, telemarketing conduct that is regulated by the TCPA but is neither misleading nor unlawful, triggers intermediate scrutiny under the *Central Hudson* analysis. Under *Central Hudson*, the government may regulate commercial speech if: (1) there is substantial interest in support of its regulation; (2) the regulation is narrowly drawn to directly and materially advance the government's interest.[25]

1. There is a substantial government interest in protecting privacy.

To satisfy the first part of the Central Hudson test, the government must demonstrate the existence of a substantial interest to be served by its restriction on commercial speech. Virtually any underlying regulatory interest connected with furthering the public welfare suffices to meet this prong of the test.[26]

The TCPA was enacted to protect the privacy interests of telephone subscribers.[27] The Supreme Court has repeatedly made clear that "the protection of [] privacy is a substantial state interest,"[28] because "'[t]he State's interest in protecting the well-being, tranquility, and privacy of the home

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[22] *See* Letter from Marc Rotenberg, Executive Director, Electronic Privacy Information Center, to Ivan Seidenberg, President and co-CEO, Verizon (Feb. 7, 2002), at http://www.epic.org/privacy/cpni/verizonletter.html.

[23] 447 U.S. 557, 564-65 (1980).

[24] To prevent duplication, this section explains that generally, regulations on telemarketing are consistent with First Amendment values.

[25] *Central Hudson*, 447 U.S. at 564-65.

[26] *See Greater New Orleans Broadcasting Ass'n v. US*, 527 U.S. 173, 186 (1999) (substantial government interest in reducing social ills associated with gambling); *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504 (1996) (substantial government interest in reducing public's consumption of alcoholic beverages); *US v. Edge Broadcasting Co*., 509 U.S. 418, 423, 426, 428 (1993) (substantial government interest in accommodating competing public policies of lottery and non-lottery states); *Edenfeld v. Fane*, 507 U.S. 761, 768-69 (1993) (substantial government interest in protecting public against fraud by certified public accountants); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 414, 416-18 (1993) (substantial government interests in enhancing safety on, and aesthetics of, public property); *Board of Trustees v. Fox*, 492 U.S. 469, 475 (1989) (substantial government interests in promoting sound educational environment at state university and in protecting students against manipulative sellers of products); *Central Hudson*, 447 U.S. at 568-69 (substantial government interests in promoting energy conservation and in attempting to ensure that utility rates are fair).

[27] S. Rep. No. 102-178, at 1 (1991), reprinted in 1991 U.S.C.C.A.N. 1968.

[28] *Edenfeld v. Fane*, 507 U.S. 761, 769 (1993) ("[e]ven solicitation that is neither fraudulent nor deceptive may be pressed with such frequency or vehemence as to intimidate, vex, or harass the recipient.")

is certainly of the highest order in a free and civilized society.'"[29] Telemarketing is one of the most invasive practices. Telemarketing practices intrude upon the privacy and tranquility of the home and the efficiency of the workplace, giving the recipient no opportunity prior to the call to indicate the desire not to receive it: "Although in many locations, we expect individuals simply to avoid speech they do not want to hear, the home is different…[A] special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions."[30] Furthermore, the sheer quantity of telemarketing calls further supports the Commission's interest in promulgating regulations to protect privacy: at the TCPA's passage, Congressional findings indicated that more than 300,000 solicitors called more than 18,000,000 Americans each day.[31]

There was significant evidence before Congress of consumer concerns about telephone solicitation in general and about automated calls in particular. Congress made extensive findings, which must be granted deference by any reviewing court: "When Congress makes findings on essentially factual issues…those findings are of course entitled to a great deal of deference, inasmuch as Congress is an institution better equipped to amass and evaluate the vast amounts of data bearing on such an issue."[32]

The Congressional concerns about privacy have only been enhanced by recent technological inventions increasing the ease and efficiency of telemarketing strategies. For example, predictive dialers did not enter mainstream usage until after the passage of the TCPA[33]; and the estimated number of daily telemarketing calls has grown exponentially in the last ten years.[34] Therefore, the Commission's proposed regulations, related as they are to a documented and substantial government interest, satisfy the first prong of *Central Hudson*.

2. The Commission's regulations directly and materially advance the substantial government interest.

Because Congress and the Commission have a substantial interest in protecting the privacy of those interrupted by annoying and unwanted telemarketing calls, it takes nothing more than common sense to see that proscribing or limiting that conduct clearly advances this interest.[35] Therefore, the regulations considered by the Commission directly advance individuals' right to privacy. Intermediate scrutiny of commercial speech does not require scientific studies; instead,

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[29] *Frisby v. Schultz*, 487 U.S. 474, 484 (1988) (quoting *Carey v. Brown*, 447 U.S. 455, 471 (1980)) ("The First Amendment permits the government to prohibit offensive speech as intrusive when the 'captive' audience cannot avoid the objectionable speech.").

[30] *Id*. at 484-85.

[31] See 47 U.S.C. § 227, Congressional finding No. 3.

[32] *Walters v. Nat'l Ass's of Radiation Survivors*, 473 U.S. 305, 331 n. 12 (1985).

[33] Predictive Dialers (PDs) were not generally used in 1991. Now PDs make most calls, which increase a firm's call rate and talk time eight-fold. *See* Affidavit of Randy Hicks: Director of Automation and Network Operations in the Operations group of WorldCom. In support of the Opening Comments of [MCI] WorldCom, Inc., on Draft Decision of [California PUC] Commissioner Brown – Rulemaking No. R.02-02-020.

[34] Privacy Expert Bob Bulmash of Private Citizen, Inc. estimates that 650 million telemarketing calls are made to residences daily. This number includes abandoned calls.

[35] *See Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 507 91981 (plurality op.) ("If the city has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them.")

it approves the use of "any evidence that is reasonably believed to be relevant for demonstrating a connection between speech and a substantial, independent government interest."[36]

Although a regulation may not be sustained if "it provides only ineffective or remote support for the government's purpose,"[37] the Court has upheld regulations where the government provides studies or anecdotal evidence validating its supposition.[38] That evidence may include "history, consensus, and simple common sense."[39] External evidence of the disruption caused by unwanted telemarketing calls is not necessary, as "[i]t is evident to anyone who has received such unsolicited calls when busy with other activities."[40] In addition, there was significant evidence before Congress of consumer concerns about telephone solicitation.[41] Clearly, placing restrictions upon more egregious and privacy invasive telemarketing conduct (for example, limiting the times of the day that phone calls can be made and restricting use of the devices such as predictive dialers that permit the exponential increase of calls made during a single day to a single number) directly and materially advances the government interest in protecting privacy. Further, Congress and the Commission can validly advance their interest by regulating a portion of these calls without banning all of them: "the Supreme Court has repeatedly stated that "underinclusiveness" may be the basis of a First Amendment violation only when a regulation represents an 'attempt to give one side of a debatable public question an advantage in expressing its views to the people.'"[42] The restriction on specific telemarketing practices felt to be particularly invasive—without reference to the content of these calls—is not an attempt to favor a particular viewpoint.

3. The Commission's proposed regulations are narrowly tailored to effect Congress' stated purpose underlying the TCPA.

Where a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling government interest. If a less restrictive alternative would serve the government's purpose, the legislature must use that alternative. By contrast, government commercial speech regulation need not select the "least restrictive means." The Supreme Court has carefully detailed the difference between the "narrowly tailored" fit required under strict scrutiny, and that required under intermediate scrutiny: "With respect to this prong, the differences between commercial speech and noncommercial speech are manifest."[43]

> What our decisions require is a 'fit' between the legislature's ends and the means chosen to accomplish those ends—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one

[36] *City of Los Angeles v. Alaeda Books, Inc*., 122 S. Ct. 1728, 1736 (2002).
[37] *Fane*, 507 U.S. at 771.
[38] *Id*.
[39] *Florida Bar v. Went For It, Inc*., 155 U.S. 618, 628 (1995).
[40] *Van Bergen v. Minnesota*, 59 F.3d 1541, 1554 (8th Cir. 1995). Although *Van Bergen* applied Time, Place and Manner scrutiny to a state telemarketing regulation, the courts have held that the "intermediate level of scrutiny applied in TPM restrictions closely resembles the regulations that restrict solely commercial speech." *Van Bergen*, 59 F.3d at 1554.
[41] *Moser v. FCC*, 46 F.3d 970, 974 (9th Cir. 1995).
[42] *Id*. at 974.
[43] *Florida Bar v. Went For It, Inc*., 515 U.S. 618, 632 (1995).

> whose scope is in proportion to the interest served, that employs not necessarily the least restrictive means but…a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decision makers to judge what manner of regulation may be best employed.[44]

Therefore, "the 'least restrictive means' test has no role in the commercial speech context,"[45] and the Commission need not "shift through all the available imagined alternative means" of regulating telemarketing.

Because the TCPA regulations are subject to intermediate scrutiny, "the requirement of narrow tailoring is satisfied 'so long as the…regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."[46] As stated above, extensive Congressional findings reveal that privacy of the home is severely threatened by invasive telemarketing. The proposed regulations are narrowly tailored to reach this interest—the Commission may reduce the volume of intrusive telemarketing calls without completely eliminating the calls.[47] The statute does not "foreclose an entire medium of expression,"[48] and the limits on telemarketing are designed to remedy the problems perceived with the liberal and invasive use of telemarketing and telemarketing technology.

Finally, the "ease of use" of the telemarketing medium—whether it be autodialers, predictive dialers, or other means—does not confer constitutional protections: "the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired."[49] The Commission's proposed regulations leave open significant alternative channels of communications, for example, although the unfettered use of some devices (such as autodialers) is prohibited, the prior consent and live operator options both allow the continued flourishing of the telemarketing economy while protecting the privacy of the consumer. That some companies prefer the cost and efficiency of certain prohibited practices does not restrict Congress or the Commission from restricting those practices:[50] "That more people may be more easily and cheaply reached…is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance when easy means of publicity are open."[51]

The conclusion contained within—that the TCPA and regulations promulgated pursuant to the Act survive First Amendment scrutiny—has been reached by the majority of the courts reviewing the Act on those grounds.[52] Furthermore, recent evidence contradicts the telemarketing industry's claim that telemarketing regulations in place under the TCPA place an

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[44] *Fox*, 492 U.S. at 480.
[45] *Florida Bar*, 515 U.S. at 632; *see also Van Bergen*, 59 F.3d at 1555 n.3;
[46] *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).
[47] *See Moser*, 46 F.3d at 975.
[48] *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994).
[49] *Heffron v. International Soc. for Krishna Consciousness, Inc.*, 452 U.S. 647 (1981).
[50] *See Moser*, 46 F.3d at 975*; Kovacs v. Cooper*, 336 U.S. 77, 88-89 (1949).
[51] *Kovacs*, 336 U.S. at 88-89.
[52] *See Moser*, 46 F.3d 970*; Van Bergen*, 59 F.3d 1541.

insupportable burden on their livelihood.[53] Because the government's *interest* in mandating the regulations has increased, while the *burden* upon speech has been thrown into question, the Commission's proposed regulations will surely survive First Amendment scrutiny.

C. *Industry-generated studies on the economics of telemarketing are suspect because they employ questionable methods, use broad definitions of sales call activities, and tend to ignore costs that are transferred to the call recipient.*

Industry-generated studies on the economics of telemarketing are suspect because they employ questionable methods, use broad definitions of sales call activities, and tend to ignore costs that are transferred to the call recipient. Studies performed on telemarketing by industry groups such as the Direct Marketing Association (DMA) rarely include explanations of study methods or datasets. For instance, shortly after the FTC announced the proposal for creation of a DNC list, a DMA official was quoted as saying: "The FTC must be careful and deliberate in weighing the merits of this proposal because more than 6 million jobs and $668 billion in sales in the United States are at stake."[54] The DMA has not adequately proved how it calculated these figures. These figures appear on the DMA website without any explanation of methods.[55]

Further, even the term "telephone marketing" is defined in a vague fashion: "Telephone Marketing includes all out-bound direct response advertising communications conducted over the telephone using conventional, WATS, private line, or other telecommunications services. This includes all outsourced and in-house telephone marketing designed to immediately sell a product or service, identify a lead, or generate store traffic."[56] A $668 billion figure calculated from this definition appears to include both inbound and outbound telemarketing. Additionally, the figure appears to include business-to-business telemarketing, business-to-consumer sales calling, and solicitations on behalf of non-profit entities. However, the DNC list and other proposals such as requiring the transmission of caller ID would not affect inbound telemarketing. The regulations set forth and complaints made by individuals primarily apply only to business-to-consumer outbound telemarketing. The FCC should not accept the DMA or American Teleservices figures without determining what percentage of sales would pertain to business-to-consumer outbound sales calling only. Additionally, these figures should not be accepted until the methods used to obtain them are adequately explained to the public.

In a recent article from the *Washington Post*, the telemarketing industry was quoted for the proposition that "people spent $276.6 billion on purchases from outbound telemarketers."[57] If one divides the sales figure by the number of households in the United States using Census statistics, this would mean that the average household spent over $2,600 on outbound telemarketing in 2001. Within a week, the President of the DMA claimed at a convention that:

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[53] *See* Scott Hovanyetz, *Time to Refresh Anti-DNC Rhetoric*, ATA Attorney, Oct. 9, 2002 *at* http://dmnews.com/cgi-bin/artprevbot.cgi?article_id=21788.

[54] *FTC Defends Plan For 'Do Not Call' Telemarketing List*, Washington Post, Jan. 23, 2002, at http://www.newsbytes.com/news/02/173871.html.

[55] *2000 Economic Impact: U.S. Direct Marketing Today Executive Summary*, at http://www.the-dma.org/cgi/registered/research/libres-ecoimp1b1a.shtml.

[56] *Direct Marketing Media Definitions*, at http://www.the-dma.org/cgi/registered/research/libres-ecoimpact5.shtml.

[57] *Have We Reached the Party To Whom We Are Speaking?; Telemarketers Aren't So Bad. Really. Just Ask 'Em*, Washington Post, Oct. 20, 2002.

"Americans spend $296.2 billion on outbound telemarketing offers."[58] If that figure is correct, the average household spends over $2,800 on telemarketing. These figures do not comport with reality.

The industry groups' studies on telemarketing also tend to ignore costs that are passed on to the consumer. Some of these costs include time that is lost in answering sales calls, frustration with frequent calls and "dead air" calls, and purchases of anti-telemarketing devices and services. Caller ID, for instance, is one service that is marketed by telephone companies as a measure to combat unwanted telemarketing. Caller ID costs consumers $7.50 a month, and it does not fully address telemarketing because many sales callers purchase phone service that does not transmit Caller ID information. Accordingly, consumers are urged to add another service to Caller ID called "Privacy Director," which is specifically advertised as being effective against telemarketers that do not transmit Caller ID information. Privacy Director from Bellsouth costs $5.95.[59] These monthly charges represent significant costs that are passed to consumers. Private Citizen Inc. estimates that consumers spend $2 billion a year in caller ID services to avoid telemarketing.[60] The industry studies rarely consider these costs when calculating the benefits of the telemarketing industry.[61]

II. TCPA Rules

A. Company-Specific Do-Not-Call lists (¶¶ 13-20). *Company-specific DNC lists have not been effective in putting individuals in control of telemarketing.*

Company-specific DNC lists have not been effective in putting individuals in control of telemarketing. With the company-specific system, individuals must specifically ask each sales caller to put them on the DNC list. Many consumers report that the caller simply disconnects the line when a request is made to be added to the DNC list.

Company specific lists place an unreasonable burden on consumers, especially when the sales call originates from a large call center. These centers initiate calls to consumers on behalf of many different companies. In order to prevent all future calls, the individual must request to be placed on a DNC list, and request that no additional sales calling is made on behalf of partners or affiliates. Consumer protection groups, such as Junkbusters Corp., have actually published scripts to help consumers navigate the process of an effective opt-out.[62]

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[58] *Wientzen: Legislative Challenges Threaten DM Industry*, DMNews, Oct. 22, 2002, at http://www.dmnews.com/cgi-bin/artprevbot.cgi?article_id=21924.

[59] BellSouth Privacy Director, at http://bsol.bellsouthonline.com/cgi-bin/gx.cgi/AppLogic+ProductPageAppLogic?applDomain=conscatalog&appName=consumer&location=404607&pc=PMX1R_.

[60] *Telecoms Play Both Sides*, CNN.com, Oct. 30, 2002, at http://www.cnn.com/2002/TECH/ptech/10/30/telemarketing.war.ap/index.html.

[61] *See* Robert Gellman, *Privacy, Consumers, and Costs: How The Lack of Privacy Costs Consumers and Why Business Studies of Privacy Costs are Biased and Incomplete*, Mar. 26, 2002, at http://www.epic.org/reports/dmfprivacy.html.

[62] Junkbusters Anti-Telemarketing Script, Junkbusters Corp., at http://www.junkbusters.com/script.html.

The NPRM has raised an important question regarding whether a national DNC database will be more invasive of privacy than company-specific lists.[63] However, a national DNC list could be implemented in such a way so as to be minimally invasive. In creating a national DNC list, the FCC should collect the minimum information necessary for enrollment. By only collecting the minimum amount of information necessary to administer the list, risk to individuals' privacy will be minimized. In this case, enrollment should only require that the subscriber submit their phone number. No other information is essential to administering the list. Additional protections for privacy would include a limit on the use of the data contained within the DNC list. Finally, in implementing the DNC list, telemarketers could be required to submit their call lists to the FTC for scrubbing. In doing so, DNC enrollees would be eliminated from call lists, and the sales callers would never actually obtain the actual membership of the DNC list.

We reject the position that the DMA's self-regulatory do-not-call list, the "Telephone Preference Service" (TPS), is adequate to allow control over telemarketing. First, enrollment in the TPS is difficult. Instead of choosing a simple name, such as "opt-out list" or "do-not-call" list, the DMA chose to describe the service abstrusely—it is not clear at all what a telephone "preference" is. DMA has placed obstacles to enrollment in the TPS. Online enrollment requires that the individual pay $5, and in the process, give their credit card number to the direct marketers. Free enrollment is only available to those who write a letter to the DMA.

On the other hand, state lists have higher success because they do not have economic interests in obstructing enrollment. As USA Today editorialized in September:

> The industry has a conflict in promoting its do-not-call plan, since telemarketers want to be free to place as many calls as possible. In 17 years, just 4.8 million consumers have signed up with the DMA's do-not-call list. By contrast, just five states -- New York, Kentucky, Indiana, Florida and Missouri -- have signed up roughly the same number in far less time.[64]

Second, the TPS only applies to DMA members, but not all telemarketers are members of the DMA. The combination of limited applicability and burdensome enrollment requirements makes the DMA TPS an ineffective tool in controlling telemarketing calls.

B. Network Technologies (¶¶ 21-22). *It is technically possible and essential to protect individuals' rights to place telemarketers under an affirmative obligation to send accurate Caller ID information every time a sales call is initiated*.

It is technologically possible and necessary for the protection of individuals to establish an affirmative obligation to send accurate Caller ID information every time a sales call is initiated. Caller ID information transmitted should identify the telemarketing company and include a publicly-listed telephone number of the telemarketer's customer service department.

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[63] Note that an opt-in system would allocate this risk to those who wished to receive telemarketing and ensure the greatest amount of consumer control. *See supra* section 1A.

[64] *Consumers deserve stronger shield against telemarketers*, USA Today, Sept. 17, 2002. In just one year, the New York DNC list amassed 2 million enrollments. *Telemarketing's Troubled Times*, CBS News, Apr. 1, 2002, at http://www.cbsnews.com/stories/2002/04/01/eveningnews/main505124.shtml.

Without Caller ID information, it is difficult for individuals to identify telemarketers and to protect their rights. Telemarketers who do not wish to comply with do-not-call rules can simply disconnect the line when a customer objects or requests information about the telemarketing company. Accordingly, without the ability to identity the sales caller, individuals cannot even make an effective complaint to authorities.

Some telemarketers and communications providers have objected to requirements to transmit Caller ID on the basis that it is not always technologically or economically feasible to transmit the information. Specifically, they have claimed that "trunk" connections, or "CT-1" service, which is cost-effective for large volumes of calls, cannot transmit Caller ID information. CT1 is only one possible choice for large volume outgoing service. The newer method, widely used because of its superior performance and flexibility, is ISDN Primary Rate Interface (PRI). It, as a matter of course, delivers Caller ID information. Telemarketers may well choose CT1 over PRI just because the service can initiate calls without transmitting Caller ID.

While the originating Local Exchange Carrier (LEC) normally inserts the Caller ID data, a telemarketer's CT1 service may connect directly to an InterExchange Carrier (IXC) such as MCI or Sprint. This subverts the sending of Caller ID information as well.

Both of these are resolvable by FCC action. The FCC could and should require the telemarketers to have their carrier inject valid Caller ID information in the call. The FCC has already ruled that carrying Caller ID is not an undue burden on carriers.[65] Given that, it cannot be an undue burden to inject the Caller ID information into the call.

We further recommend that the FCC examine requirements that telemarketers use a special area code or telephone number prefix so that individuals can easily identify sales calls with Caller ID. Such a requirement could allow individuals to avoid sales calls on a per-call basis, or to reject all sales calls. Additionally, a special area code or number prefix would allow the development of devices that could automatically handle unwanted sales calls.

C. Autodialers (¶¶23-27). *Predictive dialers should be subject to the same rules as autodialers.*

Predictive dialers certainly should be subject to the ban on calls to emergency lines, health care facilities, paging services, and any service for which the called party is charged for the call. There is no principled difference between an autodialer and a predictive dialer that would justify allowing calls to the categories of devices listed above.

The FCC should require all telemarketers to improve their predictive dialer technology so that there are no "abandoned" calls. Abandoned calls place a burden on individuals. Individuals report frustration and suspicion when they receive calls of "dead air." Telemarketers could still use predictive dialers to replace manual dialing by live operators, so long as it did not result in any abandoned calls.

[65] http://ftp.fcc.gov/Bureaus/Common_Carrier/Notices/1995/fcc95187.html.

D. Identification Requirements (¶¶28-29). *Telemarketers who abandon calls violate the Telemarketing Sales Rule*.

Abandoned calls inconvenience individuals, and present no opportunity to request that the called number be placed on a DNC list. We urge the FCC to find that such calls that do not provide identifying information to the individual are in violation of FTC rules.

E. Artificial or Prerecorded Voice Messages (¶¶30-35). *Artificial or prerecorded voice messages that have the primary purpose of inducing a commercial sale should be prohibited, absent opt-in consent*.

Artificial or prerecorded voice messages that have the primary purpose of inducing a commercial sale should require opt-in consent from the call recipient. Such calls do not differ in their invasion of privacy from artificial or prerecorded messages that pitch a specific commercial transaction. Accordingly, many "information-only" artificial or prerecorded voice messages are left for the purpose of completing a commercial sale, and should be prohibited absent opt-in consent. Similarly, artificial or prerecorded voice messages with exhortations to tune into radio or television broadcasts are intended to generate revenue from increased listenership and corresponding increases in advertising. Such calls are no less privacy-invasive than commercial calls.

F. Time of Day Restrictions (¶36). *If possible, individuals should be able to specify hours for receiving telemarketing calls.*

The Commission's 8 AM to 9 PM limitation on telemarketing calls may not reflect the preferences of a substantial number of individuals in receiving telemarketing calls. For example, many commentators have suggested that calls during the dinner hour (whenever that may be for them) are most intrusive, and others may be happy to receive calls after 9 PM.

If possible, the Commission should craft a system that allows individuals to specify when sales calls are to be made to their home. By maximizing individual choice about the times telemarketing calls can be made to them, such a provision would increase the individual's autonomy and control over their privacy. However, it is most important that the default opt-out option should designate an intent to receive no telemarketing calls. By seeking to register on the DNC list, individuals are expressing their intent to opt-out of all telemarketing intrusions. Any exceptions should be made on an opt-in basis, affirmatively specifying the days and times that telemarketing calls may be received.

G. Wireless Telephone Numbers (¶¶41-46). *The Commission should act to protect individuals from increasing unsolicited advertising via wireless text messaging*.

Unsolicited text messages to wireless telephone devices is becoming a nuisance.[66] This form of marketing communication is particularly invasive, because wireless devices are portable, and many consider these devices to be more personal than a wireline phone. Subscribers typically

[66] *The New Frontier of Mobilespam*, Wired, August 5, 2002, at http://www.wired.com/news/wireless/0,1382,54257,00.html.

are charged, sometimes on a per-message basis, to receive these messages. We encourage the Commission to vigorously pursue senders of unsolicited text messages to wireless devices.

H. Enforcement (¶¶47-66). *The Commission should create a national DNC list that supports enrollment by telephone (via a toll free call), mail, and online registration. The Commission's actions should not preempt state efforts to limit telemarketing.*

The Commission should allow states to craft stronger protections against telemarketing. Historically, state authorities have been on the forefront of privacy protection, and their leadership can continue to address privacy abuses by telemarketers.

America's prior experience with privacy legislation clearly favors federal laws that allow states to develop complementary protections. The Electronic Communications Privacy Act, the Right to Financial Privacy Act, the Cable Communications Privacy Act, the Video Privacy Protection Act, the Employee Polygraph Protection Act, the Telephone Consumer Protection Act, the Driver's Privacy Protection Act, and the Gramm-Leach-Bliley Act all allow states to craft protections that exceed federal law.[67]

In the areas of civil rights law, open meetings and open records acts, and consumer protection generally, the states have crafted tailored laws that best address particularized needs of individuals. In recent years, states have enacted more comprehensive laws against the secondary use of financial information,[68] health information,[69] and prevention of identity theft than the federal government.[70] It is clear that state protections are vital to individuals' privacy.

State protections tend to extend longer statutes of limitations to individuals, as well as private rights of action, and receive aggressive enforcement from Attorneys General. Additionally, individuals armed with a private right of action can evade barriers to enforcement posed by federal agencies that may be captured by industry.

In the area of telemarketing, state law has been essential to protecting individuals' rights. State DNC lists have been proven to be effective in reducing unwanted telemarketing. The Attorneys General have vigorously enforced state telemarketing DNC laws. State Attorneys General can take action quickly to enforce laws and defend the rights of citizens.[71] Also, state DNC lists have been made easily accessible to individuals for enrollment. Many states provide mail, telephone, and Internet enrollment.

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[67] Respectively at 18 U.S.C. § 2510 et. seq., 12 U.S.C § 3401, 47 USC § 551, 18 USC § 2710, 29 USC § 2009, 47 USC § 227, 18 U.S.C. § 2721, and 15 U.S.C. § 6801.

[68] *See* Vermont Banking Division Regulation B-2001-01: Privacy of Consumer Financial and Health Information, at http://www.bishca.state.vt.us/Regs&Bulls/bnkregs/REG_B2001_01.pdf.

[69] *See The State of Health Privacy: An Uneven Terrain*, Health Privacy Project, at http://www.healthprivacy.org/info-url_nocat2304/info-url_nocat_show.htm?doc_id=35309.

[70] *See* California Senate Bill 168, at http://info.sen.ca.gov/pub/bill/sen/sb_0151-0200/sb_168_bill_20010914_enrolled.html.

[71] *FTC Anti-Telemarketer List Would Face Heavy Demand*, Washington Post, Mar. 19, 2001, at http://www.washingtonpost.com/wp-dyn/articles/A47200-2002Mar18.html.

Last, as Justice Brandeis once noted, states may engage in experiments in law to develop more effective protections over time: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[72]

The Commission should create a national DNC list that supports enrollment by telephone (via a toll free call), mail, and online registration. The availability of Internet enrollment is important. Already, many states are providing Internet enrollment for DNC lists.[73] Internet enrollment is convenient, and it allows the user to verify enrollment via e-mail. Internet enrollment will relieve some of the paperwork burden and call volume to the enrollment number. Additionally, the individual can save or print a confirmation that their line is enrolled in the DNC database along with the date and time it was included.

The cost of implementing a DNC list for telemarketers will be relatively small. Under the current rule, Section 310.4(b)(1)(ii), and the Telephone Consumer Protection Act (TCPA), telemarketers are required to maintain a DNC list to effectively comply with these rules.[74] A national list will only require telemarketers to add new numbers to the lists they currently maintain in response to individual requests and state DNC lists. No new technical or infrastructure improvements will be necessary for a telemarketer who is, as required, already maintaining a DNC list.

More importantly, the issues of costs are not solely a matter for telemarketers. There is a significant cost placed on consumers who lose the ability to control access to their telephones. Every telemarketing call requires time of the individual; often this is time the individual would rather spend with her family or in pursuit of another activity within the privacy of her home. In addition, individuals are purchasing services such as caller ID and call screening services in attempt to eliminate telemarketing interruptions. These costs are a direct result of telemarketing activity.

The current federal system only addresses telemarketing calls once they are placed. This permits telemarketers to force the burden and costs of avoiding telemarketing calls on individuals because it is impossible to prevent unwanted telemarketing until a phone call is placed, causing an initial interruption and invasion of personal time. Once the individual receives a phone call, she must utter the magic words "place me on your do-not-call list," and this request is effective against only that one single telemarketer.

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[72] *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932)(Brandeis, J., Dissenting).

[73] *See* Alabama do-not-call Registry *at* http://www.psc.state.al.us/nocall/No-Call%20Web%20info1.htm; Colorado Do-Not-Call List, *at* http://www.coloradonocall.org/; Georgia Residential Consumers Application for Registration, *at* https://www.ganocall.com/resident.htm; Indiana Telephone Privacy, *at* http://www.ai.org/attorneygeneral/telephoneprivacy/; Louisiana Do Not Call Program, *at* http://host.ntg.com/donotcall/; Missouri No Call Law, *at* http://www.moago.org/nocalllaw.htm; New York Do Not Call Registry, *at* https://www.nynocall.com/index.html; Oregon No Call List, *at* http://www.ornocall.com/index.htm; Texas No Call List, *at* http://www.texasnocall.com/.

[74] *See* Telephone Consumer Protection Act, 47 U.S.C. § 227.

A national DNC registry would enable an individual, wishing to stop telemarketing calls, to exercise her right to privacy in the home by placing her name on the list. This benefit to the individual significantly outweighs any small costs telemarketers incur in updating their lists.

A federal DNC list is important to address shortcomings in state efforts to place individuals in control of telemarketing. Not all states have a DNC list, and some states have DNC lists riddled with exceptions. A federal DNC should coexist with state lists, and provide a baseline of protection for all individuals.

Furthermore, telemarketers will offset any costs they incur by having the opportunity to limit their phone calls to individuals who are open to their calls and a possible sale. No longer will telemarketers' time and money be spent calling individuals who have no wish to purchase any type of product through outbound telephone sales. Ultimately, telemarketers will spend a significantly greater amount of their time calling interested parties and "hot" leads. In effect, the FCC is enhancing the efficiency and effectiveness of telemarketing, while protecting individual privacy.

We think it is important for the FCC to cooperate with the FTC in developing DNC registries. If the FCC chooses not to create a national DNC list, we urge the agency to cooperate with the FTC. Specifically, the FCC should use its authority under the TCPA to extend a FTC list to cover common carriers, insurance companies, and other entities outside FTC jurisdiction.

Business and wireless telephone subscribers should also be able to enroll in the FCC DNC list. Telemarketing calls, especially to small businesses, can interrupt operations and impose costs on the call recipient. Wireless telephone subscribers too are inconvenienced and inherit costs from telemarketing. Many wireless subscribers treat their portable device as their "home phone." Additionally, if number portability is further developed, it will become more complex for telemarketers to determine whether they are calling a wireline or wireless device. Accordingly, wireless subscribers should be able to enroll in the DNC list.

To maximize the privacy and security of the DNC list, the FCC should adopt protections that exceed those planned by the FTC.[75] As noted before, privacy and security could be maximized by collecting the minimum amount of information necessary for enrollment—that is, the telephone number to be included on the list. If the FCC determines that additional information is necessary, the information collected should not be personally-identifiable. It is not necessary to collect names, addresses, or other personally-identifiable information from enrollees.

[75] FTC Privacy Act Notice, 67 Fed. Reg. At 8985.